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No. 97-220

In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Petitioner,

vs.

CITY OF LA PORTE AND ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of La Porte, Texas, and the Zoning Board of Adjustment of the City of La Porte, Texas, request that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 10, 1997.

STATEMENT OF THE CASE

This is a zoning case in which the Petitioner, a state trade association representing the mobile home industry, challenges the authority of Texas cities to regulate the location of mobile homes within their boundaries.

Only two months ago, the Court denied certiorari to the same Petitioner in a similar case under substantially identical circumstances. Petitioner seeks to distinguish its earlier petition from this one by arguing that the law has been changed by recent developments. Pet. 5-9. In fact, the "recent developments" on which Petitioner relies, an opinion of this Court issued on May 19, 1997, and a statement of policy published by the United States Department of Housing and Urban Development ("HUD") on April 24, 1997, do not change the law as applied to this case by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

The Court has Recently Denied a Petition for Writ of Certiorari in a Similar Case Under Substantially Identical Circumstances.

On June 23, 1997, the Court denied the petition for a writ of certiorari in *Texas Manufactured Housing Association, Inc. and A. J. Waller, Sr. v. City of Nederland and Zoning Board of Appeals of the City of Nederland,* No. 96-1707. That case presented the same issues and arose in substantially the same procedural context as the instant case. The United States Court of Appeals for the Fifth Circuit specifically acknowledged the similarity of the two cases in its memorandum opinion in this case as follows:

> Having carefully considered the oral arguments, briefs, the opinions of the district court, and the record, we conclude that the recent panel decision in [the *Nederland* case] essentially forecloses TMHA's arguments. In particular we have reviewed the affidavits and exhibits relied upon by TMHA at oral argument to distinguish *Nederland*, and conclude that there is no distinction sufficient to raise a genuine issue of material fact on its commerce clause, preemption, or equal protection claims.

App. 4a-5a

II.

The Two Recent Developments Cited by Petitioners do not Change the Law Applied to this Case by the Court Below.

Petitioner seeks to distinguish its petition in this case from its petition in the *Nederland* case by arguing that this Court's recent decision in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, 117 S. Ct. 1590 (1997), and a recent publication by the Department of Housing and Urban Development are material to the issues presented. Pet. 5-9. Contrary to Petitioner's assertions, these recent developments are not material to the issues raised in the Petition.

A. The Court's Decision in *Camps* is not Material to Petitioner's Claim that La Porte's Facially Neutral Zoning Ordinance had a Discriminatory Effect on Interstate Commerce.

Petitioner contends that the Court in *Camps* announces new principles of Commerce Clause analysis that are applicable to Petitioner's Commerce Clause claim in this case. Pet. 5-6. Petitioner cites general language from the *Camps* decision for the proposition that the Court has now adopted a more stringent standard of review for legislation challenged under the Commerce Clause that should be applied to this case. Contrary to Petitioner's assertions, *Camps* does not announce a new or more stringent standard of review but instead applies the established standard applicable to a "per se" violation. The state tax statute challenged in *Camps* was found to be discriminatory on its face. *Camps*, 117 S. Ct. at 1598.

State laws that discriminate against interstate commerce on their face are reviewed under the stringent "per se" standard. *Id.* In contrast, this case involves a claim that a facially neutral zoning regulation has the effect of discriminating against interstate commerce. The standards of review applicable to facially discriminatory and facially neutral legislation are substantially different. *Camps,* 117 S. Ct. at 1601, n. 16. The language Petitioner cites from *Camps* in support of their Petition is applicable only to "per se" cases and has no application to the facts of this case. *Id.*

B. The Publication of HUD's Statement of Policy is not Material to Petitioner's Claim that the Challenged Zoning Regulation is Preempted by Federal Law.

Petitioner also relies on a recently published statement of policy by the U.S. Department of Housing and Urban Development as support for their petition. Pet. 7-9. Statement of Policy 1997-1, 62 Fed. Reg. 24337, is an interpretive publication concerning HUD's position on the preemptive effect of the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Act"). The HUD policy is not material to Petitioner's preemption claim because HUD's position on preemption is consistent with the analysis of that issue by the Fifth Circuit and because HUD's interpretation, even if it did support Petitioner's claim, would not be binding on the courts.

1. HUD'S Position on the Preemptive Effect of the National Manufactured Housing Construction and Safety Standards Act is Consistent with the Preemption Analysis Employed by the Court Below.

The basic premise of the Statement of Policy is that a local governmental entity "is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction or safety code that is different from the Federal standards prescribed under the Act." App. 70a. The analysis suggested by the Statement of Policy is exactly the analysis performed by the Fifth Circuit in this case. (App. 4a-5a) and in the Nederland case, *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095, 1099-1100 (5th Cir. 1996), *cert. denied*, ___ S. Ct. ___ (1997). Therefore, the publication of the policy is immaterial to the issues resolved by the Fifth Circuit.

2. HUD has no Statutory Authority to Enforce or Issue Binding Interpretations of the Preemptive Provision of the National Manufactured Housing Construction and Safety Standards Act.

The Act grants HUD the authority to "establish by order appropriate Federal manufactured home construction and safety standards." 42 U.S.C. § 5403(a) (1995). The Act also prohibits states and their subdivisions from enacting manufactured housing construction and safety standards that are different from those promulgated by HUD. 42 U.S.C. § 5403(d). However, the Act does not provide HUD with authority to enforce 42 U.S.C.

§ 5403(d) (1995) or to adopt regulations interpreting the Act's preemptive effect.

On January 23, 1997, HUD published a document entitled "Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption." 62 Fed. Reg. 3456. In that document HUD acknowledged its lack of authority in this area, conceding that the Manufactured Housing Construction and Safety Standards Act "does not impose a duty on HUD to make any determination as to the applicability of the [Act's] preemption provision, to investigate preemption issues, or to render advisory opinions regarding preemption questions." App. 59a. HUD's subsequent publication of Policy Statement 97-1 on May 5, 1997, in which it sets out its interpretation of the applicability of the Act's preemption provision to certain local regulations, is clearly not determinative on the question of preemption. As HUD explains in its January 23, 1997, publication, "Generally, enforcement of preemption requirements is left up to the Courts. Where an issue is unclear, it is appropriate for the Courts to decide whether a State or local requirement is preempted." App. 59a. Thus, even if HUD's statement of policy could be read to support Petitioner's preemption claim it would not be material to the resolution of the claim.

CONCLUSION

Respondents respectfully urge the Court to deny the Petition for the reasons stated.

Respectfully submitted,

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